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No. 92-6033

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

WILLIAM MCNEIL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a district court may entertain an action under the Federal Tort Claims Act filed before the plaintiff seeks relief from the defendant agency, as required by 28 U.S.C. 2675(a), if the plaintiff subsequently seeks relief.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B3) is reported at 964 F.2d 647. The opinion of the district court (Pet. App. A1-A7) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 20, 1992. A timely petition for rehearing was denied on June 26, 1992. See Pet. App. B1. The petition for a writ of certiorari was filed on September 21, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a state prisoner in Illinois. On March 6, 1989, he filed this action, contending that the prison had compelled him to participate in experiments conducted or financed by the United States Public Health Service. Petitioner alleged that in one of those experiments he was required to share a cell with another prisoner who had AIDS and that he contracted hepatitis as a result of the experiments. Petitioner alleged that the United States was liable under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346, and requested $20 million in damages. Pet. App. A1; B1.

Although 28 U.S.C. 2675(a) bars a person from filing suit under the FTCA "unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing," petitioner did not present his claim to the Public Health Service (or any other federal agency) before he filed suit. Instead, on July 7, 1989, four months after he had filed suit, he filed an administrative claim with the Department of Health and Human Services (HHS). HHS denied the claim on July 21, 1989. Pet. App. A2-A3; B1-B2.

2. The district court dismissed the suit for lack of jurisdiction because petitioner had not "first presented his claim" to the agency before filing his complaint. Pet. App. A1-A7. The court stated that the FTCA is a waiver of the federal government's sovereign immunity and thus "must be strictly

construed." Id. at A6. The court rejected the contrary view of the Eighth Circuit in Celestine v. Veterans Administration Hospital, 746 F.2d 1360, 1363 (1984), where the court entertained a complaint filed before completion of the administrative claims process. Instead, the court followed the analysis adopted by the Fifth Circuit in Reynolds v. United States, 748 F.2d 291, 292 (1984) (no jurisdiction over suit filed after seeking administrative review, but before action by agency). Pet. App. 4-6.

3. A divided panel of the court of appeals affirmed. Pet. App. B1-3. The court noted the holdings of the Eighth Circuit in Celestine and the Third Circuit in Kubrick v. United States, 581 F.2d 1092, 1098 (1978), rev'd on other grounds, 444 U.S. 111 (1979), which would allow FTCA suits to proceed if the administrative claim is denied before any substantial progress is made in the suit, but rejected those holdings as contrary to the plain language of the statute. The court noted that neither decision "discussed the language of § 2675(a)" or "explain[ed] why the statute Congress actually enacted may be disregarded." Pet. App. B2.[1/]

[1/] The panel declined to consider whether a letter petitioner had written to the district court after exhausting administrative remedies was adequate to constitute a separate complaint, noting that petitioner "did not characterize the letter as a complaint in the district court (where he represented himself) or here (where a professor of the Loyola School of Law is serving as his counsel)." Pet. App. B3. Judge Ripple dissented on that point, concluding that the letter in question, considered in light of petitioner's status as a prisoner proceeding pro se, was adequate to constitute a separate complaint. Ibid. In a footnote, Judge Ripple noted that he "respectfully differ[ed] with [his] colleagues as to whether [petitioner] raised this issue adequately." Id. at B3 n.1. Petitioner does not present that question in the petition.

ARGUMENT

1. Petitioner argues (Pet. 4-7) that the court of appeals erred in holding that 28 U.S.C. 2675(a) bars district courts from entertaining FTCA actions when the plaintiff exhausts administrative remedies after filing suit, but before substantial progress on the merits of the suit.

The Federal Tort Claims Act, 28 U.S.C. 1346, 2671-2680, waives the sovereign immunity of the United States for certain tort actions. As a condition to this waiver of immunity, the FTCA provides:

> An action shall not be instituted upon a claim against the United States [under the FTCA] unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing * * * . The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant at any time thereafter, be deemed a final denial of the claim for purposes of this section.

28 U.S.C. 2675(a). As the Fifth Circuit has recognized, this requirement is "entirely unambiguous," Reynolds v. United States, 748 F.2d 291, 292 (5th Cir. 1984). A tort claimant "shall not" commence proceedings in court against the United States without first filing the claim with the appropriate federal agency and either receiving a conclusive denial or waiting for six months to elapse without a final disposition. It is undisputed that petitioner did not comply with those requirements: petitioner filed this action in the district court on March 6, 1989, Pet.

2., but did not file a claim with the administrative agency until July 7, 1989, Pet. 3.[2]

Petitioner contends, however (Pet. 6-7), that courts should entertain this suit in the face of petitioner's failure to comply with those requirements, invoking what he perceives to be the "[a]pparent injustice to F.T.C.A. plaintiffs" caused by the decision of the court of appeals. The court of appeals correctly recognized, however, that it was not free to vary the explicit jurisdictional requirements established by Congress, particularly when the jurisdictional requirements are conditions on a waiver of the sovereign immunity of the United States. Compare Hallstrom, 493 U.S. at 28-29 (rejecting similar arguments). As this Court has explained, the FTCA "waives the immunity of the United States," and in construing the conditions of that waiver, the Court has been reluctant to "take it upon ourselves to extend the waiver beyond that which Congress intended." 444 U.S. 111, 117-18 (1979). Thus, the Court's "decisions have interpreted the Act to require clear relinquishment of sovereign immunity to give jurisdiction for tort actions." Dalehite v. United States, 346 U.S. 15, 31 (1953).

This Court has made it clear -- even in suits involving private parties -- that a statute that requires a plaintiff to give notice of a claim to an agency as a condition to filing suit in federal court cannot be construed to allow the plaintiff to

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[2] As noted above, the claim was denied by HHS only two weeks after petitioner filed it.

"file suit before fulfilling the * * * requirement," because the courts "are not at liberty to create an exception where Congress has declined to do so." Hallstrom v. Tillamook County, 493 U.S. 20, 26-27 (1989). The language at issue in Hallstrom -- which provided that "[n]o action may be commenced" until the required notice had been given -- is substantively indistinguishable from the language at issue here -- which provides that "[a]n action shall not be instituted" until the plaintiff seeks recourse from the agency. Accordingly, the result reached in Hallstrom should follow a fortiori in this case because it involves a statute that waives the sovereign immunity of the United States.

The construction urged by petitioner is inconsistent not only with the language of the statute, but with the policies that moved Congress to enact it. As the Senate Report explained, Congress made filing of an administrative claim a prerequisite to an FTCA suit "to ease court congestion and avoid unnecessary litigation, while making it possible for the Government to expedite the fair settlement of tort claims asserted against the United States." S. Rep. No. 1327, 89th Cong., 2d Sess. 2 (1966).[3] The Senate Report goes on to explain that the amendment would streamline the process by making the agencies the initial arbiters of federal tort claims; because the agency whose activity is alleged to have caused the harm "would have the best

[3] See Douglas v. United States, 658 F.2d 445, 447 (6th Cir. 1981) ("[t]he compulsory administrative claim procedure in the amended FTCA was established to reduce congestion of federal courts' dockets and to speed fair treatment of those asserting claims against the federal government").

information concerning the activity [and] is the one directly concerned, it can be expected that claims which are found to be meritorious can be settled more quickly without the need for filing suit and possible expensive and time-consuming litigation." Id. at 3. To the extent the procedures were modeled on municipal procedures designed "to protect the municipality from the expense of needless litigation, give it an opportunity for investigation, and allow it to adjust differences and settle claims without suit," id. at 4, the purpose of the legislation would be defeated if petitioner were able to circumvent the presentment process and proceed directly to federal court. In light of the plain language of Section 2675(a), and the reasons for its enactment, petitioner's argument should be rejected.

2. Petitioner correctly notes that the courts of appeals have reached conflicting results on the question. The Eighth Circuit has adopted the rule urged by petitioner. Celestine v. Veterans Administration Hospital, 746 F.2d 1360, 1363 (1984).[4] On the other hand, the Seventh Circuit's decision in this case follows the analysis adopted by the Fifth Circuit in Gregory v. Mitchell, 634 F.2d 199, 204 (1981), and Reynolds v. United States, 748 F.2d 291, 292 (5th Cir. 1984). Moreover, the Ninth Circuit recently has joined the majority position, rejecting

[4] The Third Circuit also adopted that rule in Kubrick v. United States, 581 F.2d 1092, 1098 (1978), but this Court reversed the decision on other grounds, United States v. Kubrick, 444 U.S. 111 (1979). Because the Third Circuit has not revisited the issue during the intervening years, it is possible that it might withdraw from the analysis it articulated in Kubrick.

Celestine in Jerves v. United States, 966 F.2d 517, 521 (1992). The decision of the court of appeals also is consistent with the views of the Fourth Circuit, which has stated that the requirements of Section 2675(a) are jurisdictional, a view that is, at best, in tension with the conclusion of the Eighth Circuit in Celestine. Plyler v. United States, 900 F.2d 41, 42 (4th Cir. 1990).

Nevertheless, we do not believe that the issue demands review at this time, because there is a significant likelihood that the conflict will be resolved without intervention by this Court. As the court of appeals noted, the Eighth Circuit's decision in Celestine has no independent analysis of the language of the statute, but relies wholly on the decision of the Third Circuit in Kubrick v. United States, 581 F.2d 1092, 1098 (1978). Kubrick itself similarly contains no analysis of the statute; indeed, the opinion does not even quote the language. Moreover, because this Court reversed Kubrick on other grounds in United States v. Kubrick, 444 U.S. 111 (1979), the decision of the court of appeals in that case has only questionable precedential value. In light of the consistent trend of decisions by the Fifth, Seventh and Ninth Circuits, and this Court's analysis of a strikingly similar statute in Hallstrom, we believe that the Eighth Circuit would be likely to reconsider its position in an appropriate case. In our view, a decision declining to do so, and holding against the government on the basis of Celestine, would warrant summary reversal in light of Hallstrom. Accordingly, we do not believe plenary review is necessary at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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